No. 231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR RESPONDENTS

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MEMORANDUM FOR RESPONDENTS

In March 1964, the Federal Power Commission consolidated for hearing forty applications by producers requesting certificates of public convenience and necessity to undertake the interstate sale of natural gas produced in the upper Texas Gulf Coast (from a producing area known as Texas Railroad Commission

District No. 3). The contracts on which the applications were based had been entered into between September 1958 and October 1963, and the apparent basis for consolidation was that all of the contracts called for initial prices in excess of 16¢ per Mcf—the highest price the Commission had ever found to be in-line.

On the two key issues in the case, the Commission majority, rejecting consumer contentions, held in September 1965 (1) that the certificate applicant was not required to demonstrate that there was a public need for the proposed sale, and (2) that the in-line price in District 3 increased from 16¢ to 17¢ for contracts dated after September 28, 1960, *Hawkins & Hawkins,* Op. 475, 34 FPC 897. On appeal, the U. S. Court of Appeals for the District of Columbia Circuit reversed on both points, *Public Service Commission of New York* v. *F.P.C.*, 373 F. 2d 816 (1967). Petitions for certiorari filed by the FPC and by two groups of producers who had intervened in the court below in support of the FPC are now pending (Nos. 111, 143, and 144, this Term).* We have heretofore filed a memorandum noting our acquiescence in the grant of certiorari, but objecting to the procedure recommended by the FPC.

The instant petition for a writ of certiorari filed by The Superior Oil Company differs in one important respect from the petitions heretofore filed. Like the producer petitioners in Nos. 111 and 143, Superior was an applicant in the proceeding before the FPC (it sought certificates for sales under two contracts, each calling for an initial price of 17.5¢ per Mcf, and dated,

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* The FPC (No. 144) and Shell Oil Company (No. 111) challenge only the D. C. Circuit's reversal of the in-line finding. Skelly Oil Company (No. 143) additionally challenges the D. C. Circuit's reversal of the Commission's holding on need.

respectively, August 1, 1959 and September 20, 1962); it intervened in the court below in opposition to the New York Commission's petition to review the FPC's opinion; and in its present petition it seeks this Court's review of the D. C. Circuit's reversal of the Commission's in-line and need holdings (see Superior Pet. p. 4, Questions 1 and 4). Unlike the other producers, however, Superior not only intervened in the New York Commission's appeal in the court below, but in addition it filed its own appeal, claiming that the Commission erred in failing to find in-line levels even higher than the 16¢-17¢ levels set by the Commission in Opinion No. 475. Superior's contentions were rather summarily rejected by the court below (373 F. 2d at 830; Shell Petition, No. 111, p. 37), and Superior now seeks to have this Court review those contentions (Superior Pet. p. 4, Questions 2 and 3).

While, for the reasons set forth in our Memorandum of June 7, 1967 in Nos. 111, 143, and 144, we acquiesce in the grant of certiorari on Superior's Questions 1 and 4, we strenuously oppose the grant of certiorari on Superior's Questions 2 and 3.

By its Question 2, Superior challenges the FPC's refusal, in determining the in-line price, to consider certain 20¢ sales certificated by the FPC in 1959 under standards which the FPC subsequently conceded were legally impermissible. The Commission has consistently held that such sales provide no valid basis for evaluating the in-line level for the area, see, e.g., *Texaco Seaboard Inc.*, Op. 383, 29 FPC 593 (1963),*

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* Superior asserts (Pet. 6 n. 4), "No court review [of *Texaco Seaboard*] was sought due to settlement between the parties." Superior is mistaken. There was no settlement in *Texaco Seaboard;* indeed, a post-decision offer of settlement by Texaco was expressly rejected by the Commission, 30 FPC 613.

Placid Oil Co., Op. 398, 30 FPC 283 (1963), and the Commission's holdings have been consistently sustained on appeal, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). Superior does not allege any conflict among the circuits; nor does it allege that the decision of the court below affirming the Commission on this point is in conflict with any decision of this Court. We submit that the decision below was clearly correct, and that certiorari on this issue is not warranted.

The issue sought to be raised by Superior's Question 3 is even less worthy of review by this Court. Superior challenges the Commission's inclusion, in its comparative price array used to determine the in-line level, of sales made at prices of less than 14¢ per Mcf. But Superior's petition here fails to offer a single word of argument that the Commission's action on this score was erroneous, that the court of appeals' affirmance was in error, or that certiorari is warranted; and it may be noted that Superior did not brief this question at all in the court below and, in consequence, the court made no express ruling thereon. Nor can Superior assert there is a conflict with any other decision—the claim was flatly rejected in the only other case in which it was raised, *Continental Oil Co.* v. *F.P.C.*, 5th Cir. No. 23188 *et al.*, May 24, 1967, slip op. p. 14.

CONCLUSION

Any writ of certiorari granted in No. 231 should be limited to Questions 1 and 4. In the event that certiorari so limited is granted, the Federal Power Commission—which is a respondent only as to Questions 2 and 3, and is actually a co-petitioner as to

Questions 1 and 4—should be deleted as a party respondent.

Respectfully submitted,

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